An overview and the historical evolution of the Administrative Law in Turkey

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ABSTRACT

We aimed readers to have a sight about the administrative law in Turkey, its historical evolution and the perspective of the High Court for the fundamental rights and their protection by the judicial way. For this purpose, we examined the historical background of the administrative law from the beginning of the Constitutional period in Ottoman State. After that, we clarified the liability regime of the Administration in the light of the decisions of the Council of State. At the end, we displayed the evolution and protection of some fundamental rights and statues by the hand of the High Court. During the article we used the formal Constitutions and the decisions of the Council of State published in the past and tried to explain their meaning and purpose.

KEYWORDS: *administrative law; constitutional law; kanuni esasi; council of state; liability of the administration; service-connected faults; lack of service; judicial reviews; fundamental rights; statues.*

1. Introduction: Historical Background of Administrative Law

We see the first steps of constitutional movements in the 19th century, under the Ottoman Empire's power. *Tanzimat*, *Islahat* Edicts and the *Kanuni Esasi* were the primary codes as a characteristic movement of the Empire. But the Kanuni Esasi was remarkable one, which is including articles as a main structure of Judgment and it has been adoption as the first constitution of the State. Before the Kanuni Esasi, Empire established the Council of State (was taking French *Conseil d'État* as an example). Council of State (*Şurayı Devlet*) was assigned to look at the cases between the administration and the public. But the Kanuni Esasi has come with important changes for this structure and assembled suits, between the administration and the individuals, within ordinary tribunals[1]. According to the article below:

"Art. 85: Every affair is judged by the tribunal to whose province it belongs. Suits between individuals and the State are within the competency of the ordinary tribunals".

[1] Gözler, Kemal. 2003. *İdare Hukuku, Cilt I*, Bursa, Ekin, Birinci Baskı, p. 49.

On the other hand, Kanuni Esasi was regulating protection for independence of the judgments and right to fair trial, according to these articles:

"Art 81: The judges nominated in conformity with the special law on this subject and furnished with the patent of investiture are irremovable, but they can resign.

The promotion of Judges, their displacement, superannuation, and revocation, in case of judicial condemnation, are subject to the provisions of the same law.

That law fixes the conditions and qualities requisite for exercising the functions of judge or the other functions of a judicial order".

"Art. 82: The sittings of all tribunals are public... "

"Art. 83: Any person may, in the interest of his defense, make use before the tribunal of the means permitted by the law".

"Art. 86: No interference is to be attempted with the tribunals".

"Art. 89: Apart from the ordinary tribunals, there cannot, under any title whatever, be formed extraordinary tribunals or commissions to judge certain special cases... "

"Art. 90: No judge can combine his functions with other functions paid by the State".

1919 and ongoing years were the new era for transformation of the structure of the judicial system and administrative law, which was initiated of the establishing of the Republic of Turkey under the lead of Mustafa Kemal Atatürk. Turkish Grand National Assembly convened in Ankara in 1920, the new Constitution which has granted sovereignty to the Turkish nation has been adopted in 1921 and the abolition of the Sultanate has been occurred in 1922. The Republic has been founded in 1923. Caliphate has been removed in 1924. The Turkish Grand National Assembly adopted a new constitution in 1924. New constitution was not only maintaining national sovereignty but also established the principle of supremacy of the Constitution. Beside of granting modern rights of Turkish citizens, such as the freedom of thought, freedom of conscience, freedom of speech, freedom of the press, freedom of contract etc. and including articles for the establishing of State of Council. In this constitution, duty and competence of the Council of State has been regulated as below:

"Article 51: There shall be established a Council of State which shall be call upon to decide administrative controversies and to give its advice on contracts, concessions and proposed laws drafted and presented by the Government, and to perform specific duties which may be determined by law. The Council of State shall be composed of persons chosen by the Grand National Assembly, from among those who have held important posts, who possess great experience, who are specialist, or who are otherwise qualified".

Ongoing years, the reception of the Civil Code from Switzerland, the Penal Code from Italy and the adoption of a Commercial Code inspired by the German model were proving of the new secular and modern characteristic of the judgment system.

After military intervention of 27 May 1960, the revolutionary officers started to prepare a new constitution to establish a more pluralistic type of democracy which was including more protection to maintain the pluralist-democratic nature of the state. The new constitution was defining the duties of the Council of State as below:

"Article 140: The Council of State is an administrative court of the first instance in matters not referred by law to other administrative courts, and an administrative court of the last instance in general. The Council of State shall hear and settle administrative disputes and suits, shall express opinions on draft laws submitted by the Council of Ministers, shall examine draft regulations, specifications and contracts of concessions, and shall discharge such other duties as prescribed by law..."

Thus, there has been based the field for administrative judgment outside of the judicial justice under the lead of Council of State in the period of the Republic[2)].

There were two amendments of the constitution which weakened the liberties and reduced the power of the judiciary in 1971 and 1973 under the influence of the military. Finally, in 12 September 1980 another military coup occurred which was establishing the new Constitution prepared by the Advisory Council, confirmed by National Security Council (with participating of the Chief of the General Staff and four Commanders) and accepted by public with a controversial referendum.

Ever since the adoption of the 1924 Constitution the judiciary has been regarded an independent branch[3)]. According to the Constitution of 1982, which is also prevailing currently, judiciary has been regulating in several articles. Article 9 is about independence of judiciary:

"Article 9: Judicial power shall be exercised by independent and impartial courts on behalf of the Turkish Nation".

Principle of the supremacy of Constitution and its binding force has been regulated in the article below:

"Article 11: The provisions of the Constitution are fundamental legal rules binding upon legislative, executive and judicial organs, and administrative authorities and other institutions and individuals.

Laws shall not be contrary to the Constitution".

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2) Gözler, Kemal. 2003. *İdare Hukuku, Cilt I*, Bursa, Ekin, Birinci Baskı, p. 50.

3) Yazici, Serap. 2006. *A Guide to the Turkish Public Law Order and Legal Research*.

The independence of the courts has been regulated with strong protections in the Article 138:

"Article 138: Judges shall be independent in the discharge of their duties; they shall give judgment in accordance with the Constitution, laws, and their personal conviction conforming to the law.

No organ, authority, office or individual may give orders or instructions to courts or judges relating to the exercise of judicial power, send them circulars, or make recommendations or suggestions.

No questions shall be asked, debates held, or statements made in the Legislative Assembly relating to the exercise of judicial power concerning a case under trial.

Legislative and executive organs and the administration shall comply with court decisions; these organs and the administration shall neither alter them in any respect, nor delay their execution".

The position of the judiciary for administrative activities is regulated in detail in Article 125. According to that article, all actions and acts of administration shall be under check of judiciary:

"Article 125: Recourse to judicial review shall be available against all actions and acts of administration. In concession, conditions and contracts concerning public services and national or international arbitration may be suggested to settle the disputes arising from them. Only those disputes involving an element of foreignness may be submitted to international arbitration.

Recourse to judicial review shall be available against all decisions taken by the Supreme Military Council regarding expulsion from the armed forces except acts regarding promotion and retiring due to lack of tenure.

Time limit to file a lawsuit against an administrative act begins from the date of written notification of the act.

Judicial power is limited to the review of the legality of administrative actions and acts, and in no case may it be used as a review of expediency. No judicial ruling shall be passed which restricts the exercise of the executive function in accordance with the forms and principles prescribed by law, which has the quality of an administrative action and act, or which removes discretionary powers.

A justified decision regarding the suspension of execution of an administrative act may be issued, should its implementation result in damages which are difficult or impossible to compensate for and, at the same time, the act would be clearly unlawful.

The law may restrict the issuing of an order on suspension of execution of an administrative act in cases of state of emergency, mobilization and state of war, or on the grounds of national security, public order and public health.

The administration shall be liable to compensate for damages resulting from its actions and acts".

The position in the judicial hierarchy and the duties of Council of State and the structure of it has been referred in Article 155:

Article 155: The Council of State is the last instance for reviewing decisions and judgments given by administrative courts and not referred by law to other administrative courts. It shall also be the first and last instance for dealing with specific cases prescribed by law.

(As amended on August 13, 1999; Act No. 4446; on April 16, 2017; Act No. 6771) The Council of State shall try administrative cases, give its opinion within two months on the conditions and the contracts under which concessions are granted concerning public services, settle administrative disputes, and discharge other duties prescribed by law.

(As amended on April 16, 2017; Act No. 6771) Three-fourths of the members of the Council of State shall be appointed by the Council of Judges and Prosecutors from among the first category administrative judges and public prosecutors, or those considered to be of this profession; and the remaining quarter by the President of the Republic from among officials meeting the requirements designated by law.

The President, Chief Public Prosecutor, deputy presidents, and heads of departments of the Council of State shall be elected by the General Assembly of the Council of State from among its own members for a term of four years by secret ballot and by an absolute majority of the total number of members. They may be re-elected at the end of their term of office.

The organization and functioning of the Council of State, the qualifications and procedures of election of its President, Chief Public Prosecutor, deputy presidents, heads of departments, and members, shall be regulated by law in accordance with the principles of specific nature of the administrative jurisdiction, and of the independence of the courts and the security of tenure of judges.

2. Liability of the Administration on Damages

Before the time of Republic, the Administration generally was irresponsible from damages which were occurred by its actions[4]. This situation has slowly changed after the Council of State came into force again in 1927. And according to the regulations which are taking place in the Constitutions of 1961 (Article 114) and 1982 (Article 125), as mentioned above, the damages which were happened with Administrative acts, shall be paid by Administration itself.

There are two responsibility of Administration for damages in Turkey; defect liability and strict (objective) liability. As a result of being social state, the field of objective liability is getting broader.

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[4] Tek, Savaş. *İdare Hukukunda İdarenin Sorumluluğu*, Türkiye Adalet Akademisi Dergisi, April 2010, Nr.1, p. 317.

Defect liability can be systematized as service-connected faults and personal faults. It shall be more suitable to view on service-connected faults according to issue of this article. Service-connected faults can be categorized as lack of service, late processing of service or not processing of service.

In a *"*lack of service*"* situation, a duty of Administration is occurred but not as it had to be. Lack in service, shall be detected according to circumstances of different situations. In the judgment of the High Court, we can see the conclusion is Administration shall to take precautions to obstruct the lack of service:

"Administration should keep the personnel and machinery ever ready to deliver the public service as a part of its duty in a proper way. Full care and attention should be paid in giving the service to function properly. Moreover, the Administration should educate its personnel that shall run the service sufficiently to fit best to the necessities of it". (10th Division, K.83/1596)

Administration may not get freed at all from liability even if there is a joint by individual to fault:

"Municipality should have had rejected to habituate anybody in a building far too near to a high voltage line. Anybody that had been injured even if by his or her action (in regulating the antenna) should recover his or her damages from the municipality that have committed a service-connected fault". (8th Division)

"Late processing of service" causes damage because of the late-timing. The timing is determining in the jurisprudence of the courts. But in some cases, this timing shall be regulated by the law. Otherwise, the specific situations have to be checked to determine the timing[5)]. According to provision down below, the High Court determined a service-connected fault because of an action which is not occurred on the time.

"It is apparent that he defendant Administration has the authority to determine the characteristics and scope of the course books to be taught in classes. However, in this case, the defendant Administration did not exercise its power on time but asked to have a course book prepared by the plaintiff without determining no any characteristics or scope for such. It is only after the completion of the book that the Administration decides not to have it taught in courses, and consequently not to publish it. There appears a service-connected fault of the Administration that had not fulfilled its duty on-time". (10th Division, 88/906)

5) Günday, Metin. 2002. *İdare Hukuku*, 6th Edition, Ankara: İmaj Yayınevi, p. 322.

"Not processing of service" means, different from the others, there is no action becomes by Administration therefore it causes a damage for individual. If laws are not regulating any authorization for Administration, it is getting harder to define the "not processing" of a service. In this case, the specific situations have to be checked to determine if there is an obligation for Administration[6]. Article 65 of the Constitution provides that conclusion:

"The State shall fulfil its duties as laid down in the Constitution in the social and economic fields within the capacity of its financial resources, taking into consideration the priorities appropriate with the aims of these duties".

As seen, defect liability, mostly can be detected by depending on the visible circumstances of the case. But the strict liability is obligating the Administration with constant acts to do and compensate the damage that is not happen by an act of Administration or a neglect of its duty.

"It is among the general principles of law, and it is required by principles of fairness and equity that to compensate damages suffered privately in the course of deliverance of public service without considering the existence of a service-connected fault. The only requisite is to have a proper cause and effect bound. Thus, according to the principle of strict liability, death from blows taken in a boxing match should be compensated". (10th Division, 85/1065)

3. Judicial Reviews of the Council of State

After an overview to historical evolution of administrative law in Turkey, improving and protection of some principle of laws with by the jurisprudence of Council of State has been regarded down below.

Council of State, in the years that followed its establishment, had been in an effort that should be appreciated to create a jurisprudence for the protection of fundamental rights and freedoms, despite the acceptance of almost non-force to protection for them in the Constitution of 1924[7]. According to a judgment which was taken in 1939, the Administration's acts shall be bordered with statues and judicial decisions:

"It is not possible to render decisions that restrain one's rights and freedoms by transgressing the limits of authority granted by statue by any motive". (5. D., 29 September 1939)

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6) Tek, Savaş. *İdare Hukukunda İdarenin Sorumluluğu*, Türkiye Adalet Akademisi Dergisi, April 2010, No. 1, p. 321.

7) Azrak, Ulku, *Rule of Law and Council of State*, www.danistay.gov.tr/eng/official-8-rule-of-lawand-council-of-state.html.

The approach of the High Court became stabilize during the following years:

"The requirement that the civil rights and liberties secured in the Constitution may only be restrained if the Government is authorized by any explicit regulation is a natural consequence of the concept of Rule of Law and the principle of legality. In accordance with this role, administrative agencies cannot create any restraining arrangements on the rights of people that they had not been authorized by statues". (12. D., 8 April 1971)

"*Equality*" was the other important principle which was taken place in the views. Council of State, by the principle of treating the ones that are affected by public power equal, tries to keep the Administration away from arbitrariness[8]:

"Both of the police officers had committed the same action and both of their records are good. It is not in accordance with the principle of equality not to give a lesser punishment to one while granting it to the other". (10th Division, K.88/242)

"While it is granted by a by-law to public servants that take final exams externally but had been appointed to another location an opportunity to take the exams at their new location, it is not in accordance with the principle of equality that is secured by Article 10 of the Constitution and Article 4 of Act numbered 1739 not to give the same opportunity to ones that work in private sector or at his/her own work". (8th Division, K.87/88)

"It is not in accordance with the principle of equality that to reject a medicine school student who demands not to have questions asked that had been previously annulled by a judicial decision". (8th Division, K.85/127)

Acquired rights, came into force with the decisions of Council of State and defined in them. The High Court tries to balance benefits between the person and the Administration. But there is no way to allow Administration to acts which are irrespective to acquired rights:

"In order to claim for the existence of an acquired right gained through a previous regulation, the objective norm in that regulation should have had been applied to the related person. However, there exists no decision applied to the plaintiff in accordance with the previous regulation". (İDDGK, K. 85/67)

"After the amended by-law gets into power, only those with a university education may be employed in private typing courses. This permission granted by the Ministry is not an indefinite acceptance for the profession but is a work permit that needs a renewal. Thus, it is not possible to accept that the plaintiff who had been teaching in a

8) *AZRAK*, a.g.e.

typing course as a high school graduate before the recent regulation but then resigned has an acquired right in spite of amended legal norm". (10th Division, K. 83/2658)

"In regulating the rolls, new ones should be established, but to the best performance of the service some should be annulled as well. However, in actualizing this fact the Administration should be respective to acquired rights and in regulations take such into consideration". (İDDGK. K. 86/14)

4. Conclusions:

The result of this article, as we see, the evolution of the administrative law in Turkey, started under the period of the Ottoman State and accelerated after the Council of State which has established based on well-structured in the first years of the Republic.

As the same time, the field of the protection for individual's rights has been enlarged more and more, during the years and the jurisprudence of the High Court had been remarkable to serve this purpose.

There should not be overlooked that "Conseil d'État" in France was effective to help out as an example to structuring of Council of State in Turkey.

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